

# **Political Economy of Intellectual Property Policy-Making: Theory and Practice**

**An observation from a realistic (and slightly  
cynical) perspective**

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**DRAFT**

## Political economy of intellectual property policy-making – theory and practice – an observation from a realistic (and slightly cynical) perspective

### I. Introduction.

Two separate and unrelated phenomena (or cases or issues or events – whatever we wish to call them) mark the end of a high-profile and extremely politicized debate in the IP field. Two separate phenomena emphasize the complexity of the political and economic context in which the process of IP-policy making is taking place. Two separate phenomena highlight the interests, the forces, the lobby, and power-games characterising this field. Two separate phenomena, the outcome of each amounting to nothing but a rather shallow (and possibly hollow) politically-correct consensus with no substantial results - one way or the other.

But after such a bleak introduction surely one needs to attach some titles to these phenomena. In fact, we will do more than that, as for the sake of convenience it would be useful to attach two titles to each phenomenon – the formal title and the actual title of what it is really all about.

The first phenomenon may be formally referred to as the *Directive of the European Parliament and of the Council on the patentability of computer-implemented inventions* – CIID in the popular Jargon.<sup>1</sup> Its actual caption, however, should be the "the rise and fall of the Directive that focused on the useless contribution of the term technical contribution"

The title of the second the phenomenon is even more complex:: *Implementation of paragraph 11 of the General Council decision of 30 August 2003 on the implementation of paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health* - the WTO deal on patented medicines (or drugs) in the popular Jargon.<sup>2</sup> Here, the title "the much ado about nothing decision" springs to mind.

Later in this paper I shall describe the two issues in brief! The reason why it is not important to delve into the "nuts and bolts "of each case is that this paper seeks to flash out some of the political-economy insights associated with these cases, rather than analyzing their content and history in detail. Suffice it to say that the CIID cases related to the extent to which software-based inventions (or inventions dealing with the interface between

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<sup>1</sup> For the CIID Directive see original proposal: Commission of the European Communities. *Proposal for a Directive of the European Parliament and of the Council on the Patentability of Computer-Implemented Inventions* (Brussels: 20 February 2002), COM(2002) 92 final, [http://europa.eu.int/comm/internal\\_market/indprop/docs/comp/com02-92en.pdf](http://europa.eu.int/comm/internal_market/indprop/docs/comp/com02-92en.pdf)

For the last version see: Committee on Legal Affairs. *Recommendations for Second Reading on the Council Common Position for Adopting a Directive of the European Parliament and of the Council on the Patentability of Computer-Implemented Inventions*, Rapporteur: Michel Rocard (21 June 2005), FINAL A6-0207/2005

<sup>2</sup> WTO-Council for TRIPs. *Implementation of Paragraph 11 of the General Council Decision of 30 August 2003 on the Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health* (WTO: Geneva: 6 December 2005), IP/C/41, [http://www.wto.org/english/news\\_e/news05\\_e/trips\\_decision\\_e.doc](http://www.wto.org/english/news_e/news05_e/trips_decision_e.doc)

software and hardware) may be patentable under EU law; and the extent to which patented pharmaceutical products may be over-ridden by WTO members, insofar as to allow the exportation of generic drugs to poor countries with insufficient manufacturing capabilities.<sup>3</sup>

At first glance the two issues have nothing in common. They relate to different fields of technology (software and pharmaceuticals), they were debated in different forums (European Commission/Parliament and the WTO) and they achieved opposite results (the former was scrapped while the latter was formalized). But a more informed reflection suggests strong political and economic similarities in the manner in which they were manifested.

This paper does the following. At the outset, provides a theoretical overview of both the complexity and problematic nature of the economics of IPRs. Secondly, the paper suggests an alternative political-economy- interest-based- approach to the analysis of systemic IP outcomes. Thirdly, the paper outlines the chronological development of the CIID and WTO deal on patented medicines. Finally, the paper outlines the political-economy themes and insights to which these cases can expose us.

## **II. A brief discussion on IPRs and their complex economic nature**<sup>4</sup>

Economists explore ways of efficiently allocating scarce resources to unlimited wants and find that private property rights are a plausible way of dealing with scarcity in an efficient manner. Knowledge, however, is a unique resource given that it is not inherently scarce. Theoretically speaking, the potential use of existing knowledge is unlimited and may be diminished only when such knowledge becomes obsolete. Thus, the use of any invention by one individual does not reduce its accessibility to others but is more likely to increase it.

Patents, copyrights, trademarks and other forms of IPRs establish exclusive ownership (monopoly) of varying types of knowledge, allowing their owners to restrict, and even prevent, others from using that knowledge. The result, as Hindley puts it, is that “the establishment of private property rights in these cases artificially creates the symptoms of scarcity; they do not derive from it.”<sup>5</sup>

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<sup>3</sup>. A more detailed analysis of the above cases can be found in: Suthersanen, U. "Europe Rejects the Linguistic Struggle", in: Nurton, J. Pugatch M. (eds) *Europe- the Innovation Debate, Supplement, Managing Intellectual Property Magazine*, September 2005, pp.59-60; Pugatch M.P. "Patents, Pharmaceuticals and the Implementation of Paragraph 6 of the Doha Declaration on the TRIPs Agreement and Public Health", in: *Journal of BioLaw&Business*, vol.8:1, April 2005, pp. 16-21

<sup>4</sup>. This section is a concise extract from a previous article: Pugatch M.P. "the International Regulation of IPRs in a TRIPs and TRIPs plus World", *Journal of World Investment and Trade*, volume 6 number 3, July: 2005, pp. 231-265

<sup>5</sup>. B.V. Hindley, *The Economic Theory of Patents, Copyrights, and Registered Industrial Designs: Background Study to the Report on Intellectual and Industrial Property*, Economic Council Of Canada, Ottawa: 1971, p.1

Moreover, as explained below, although treated as a group, IPRs are fundamentally different and refer to different types of knowledge resources. Consequently, it is impossible to treat IPRs as one homogenous factor.

## **II.a The economics of IPRs from a social-welfare perspective—IPRs in a closed economy**

In principle, economists should tell us whether, on balance, a system of IPRs generates a net loss or a net benefit to society. Unfortunately, thus far, or at least for the past eighty years, economists have been unable to provide an answer to this question notwithstanding the availability of a rich and in-depth literature on the economics of IPRs.<sup>6</sup>

Consider, for example, two forms of IPRs: patents and trademarks. Common to these two forms of IPRs is the creation of market exclusivity (monopoly) in the use of existing knowledge: inventions for patents; and consumer information for registered trademarks. However, the economic theory of patents is far more problematic, since currently it is not possible to conclude whether they confer a net benefit or entail a net loss to society.<sup>7</sup>

### **Patents**

The structural trade-off built into the patent system - that in order to increase the amount of available knowledge in the future, the efficient use of existing and available knowledge is inhibited in the present - is probably its most problematic aspect.<sup>8</sup> In the absence of institutional provisions for inventions, society would face a state of under-production in inventive activities due to the problem of free-riding.<sup>9</sup> Establishing property rights in inventions, i.e. patents, allows inventors—both firms and individuals—to secure commercial returns for their work and, as such, will increase their incentive to invest in future inventive activities. On the other hand, a patent system inhibits the free and rapid dissemination of existing knowledge. Once an inventing firm has been granted a patent, it essentially becomes a monopoly, since it has the exclusive right to control both the quantity and the price of its invention.

Facing these conflicting aspects, economists have to consider which is more important to society: more available knowledge in the future; or less accessible knowledge in the present. No conclusive answer is currently available. In this context, the term “paradox of patents”, which was coined by Robinson as early as 1956, seems to capture the true nature of the

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<sup>6</sup> For an in-depth economic review of the patent system, see *ibid.*; F. Machlup, *An Economic Review of the Patent System*, Study of the Subcommittee on Patents, Trademarks and Copyrights of the Committee on the Judiciary, United States Senate, 85th Congress, Second Session, Study No. 15, Washington, D.C., 1958; C. Primo-Braga, *Guidance From Economic Theory*, in W. E. Siebeck (ed.), *Strengthening Protection of Intellectual Property in Developing Countries*, World Bank Discussion Papers No. 112, The World Bank, Washington, D.C., 1990, pp. 17–32.

<sup>7</sup> Machlup, *ibid.*, Chapter 4; Hindley, *ibid.*, pp. 1–31; Primo-Braga, *ibid.*, pp. 17–32.

<sup>8</sup> K. Arrow, *Economic Welfare and the Allocation of Resources for Invention*, in National Bureau of Economic Research (ed.), *The Rate and Direction of Inventive Activity: Economic and Social Factors*, Princeton University Press, Princeton, New Jersey, 1962, pp. 609–626; Hindley, *ibid.*, pp. 12–13.

<sup>9</sup> *Ibid.*

patent trade-off: "... by slowing down the diffusion of technical progress, patents insure that there will be more progress to diffuse."<sup>10</sup>

Economists also disagree about the effects of patents on the allocation of resources to inventive activities, the allocation of resources within the sphere of inventive activities and on the allocation to inventions as a factor of production.<sup>11</sup>

The optimum patent term of protection is also highly disputable. A longer patent term increases the incentive to invent but also prolongs the restriction on the use of existing knowledge. Therefore, not only is it difficult to establish one patent term optimal to society, but it is also likely that different inventions require different terms of protection. Thus, since a decision on a specific patent term for all inventions is bound to be arbitrary, there may be a term that is more socially desirable than the current period of twenty years.<sup>12</sup>

Back in the 1950s, Machlup argued that "no economist on the basis of present knowledge, could possibly state with certainty that the patent system, as it now operates, confers a net benefit or a net loss to society".<sup>13</sup> Sadly enough, this statement also seems to be true in our days.

## Trademarks

The economics of registered trademarks, although more coherent than that of patents, implies that the social utility of such a system will ultimately depend on the way in which trademarks are used. A system of registered trademarks may be considered an efficient source of information as long as it enables consumers to obtain additional and accurate knowledge on different products.<sup>14</sup> If this is not the case (for instance, when trademarks artificially differentiate between products that are for all purposes identical, such as in the case of generic pharmaceutical products, or when, due to extravagant advertising activities, the reputation of a given trademark exceeds the actual value of its product), trademarks can easily become a source of useless, inaccurate and even false information.<sup>15</sup>

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<sup>10</sup> J. Robinson, *The Accumulation of Capital*, Macmillan, London, 1956, p. 87.

<sup>11</sup> Hindley, *supra*, footnote 1, pp. 1–31.

<sup>12</sup> W.D. Nordhaus, Invention, *Growth and Welfare*, MIT Press, Cambridge, Massachusetts, 1969, Chapter 5; F.M. Scherer, Nordhaus' Theory of Optimal Patent Life: A Geometric Reinterpretation, *American Economic Review*, Vol. 62, June 1972, pp. 422–427.

<sup>13</sup> Machlup, *supra*, footnote 2, p. 79.

<sup>14</sup> United Nations Conference on Trade and Development (UNCTAD), *The Role of Trade Marks in Developing Countries*, Unctad, New York, 1979; E.H. Chamberlin, *The Theory of Monopolistic Competition*, 5th edition, Harvard University Press, Cambridge, Massachusetts, pp. 56–64 and 249; Hindley, *supra*, footnote 1, pp. 69–74.

<sup>15</sup> Hindley, *Ibid.*; UNCTAD, Examination of the Economic, Commercial and Development Aspects of Industrial Property in the Transfer of Technology to Developing Countries: Trade Marks and Generic Names of Pharmaceuticals and Consumer Protection, UNCTAD, New York, 1981, pp. 8–14.

## II.b IPRs in the international arena

Different countries may find it in their interests for various reasons to either support or reject a stronger international IP system. Most noteworthy are calculations concerning: (i) the effects of a stronger international system of IPRs on trade in IP-related products; and (ii) its impact on the rate and magnitude of technology transfer and foreign direct investment (FDI).

Regarding trade in IP-related products, here there is wide divergence between the interests of developed and developing countries. By definition, an international system of IPRs creates an exclusive trading environment in IP-related products, as it enables the owners of these products to become the sole exporters to all member countries in such a system.

Under an international system of IPRs, a country with strong IP capabilities will not only improve its terms of trade by becoming an exporter of IP-related products but will also benefit from additional income which represents the excess in prices that IP owners are able to charge because of their monopolistic position.<sup>16</sup> On the other hand, countries with weak IP capabilities are likely to benefit most from trade in IP-related products when choosing not to join the international IP system. Acting in this way will enable them to freely exploit and imitate IP-related products in their own domestic economies. Where they are successful, these countries may even be able to compete with the original IP owners, thus becoming exporters of such products themselves.<sup>17</sup>

Empirical data confirms the above theoretical statements. The global ownership and commercial exploitation of IPRs is completely dominated by a group of developed countries, notably the United States, the EU and Japan. Data gathered in 1996 and 2000 (based on statistics of the World Intellectual Property Organization (WIPO)) suggests that developed countries were able to maintain their dominance in the foreign ownership of patents, with a total of 95 per cent and 93 per cent, respectively.<sup>18</sup> As in previous periods, the five leading countries owned around 76 per cent of these patents, with the United States holding a total of 26 per cent.<sup>19</sup>

The second dimension in the discussion of the internationalization of IPRs focuses on the extent to which a stronger commitment to IP protection will enable developing countries to secure a greater rate of technology transfer and FDI. Of particular importance is the distinction between the direct (or static) and indirect (or dynamic) effects of IPRs on

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<sup>16</sup> R. Vernon, *The International Patent System and Foreign Policy*, Study of the Subcommittee on Patents, Trademarks and Copyrights of the Committee on the Judiciary, United States Senate, 85th Congress, Second Session, Study No. 5, Washington, D.C., 1957; E. Penrose, *The Economics of the International Patent System*, Johns Hopkins Press, Baltimore, 1951; J.C. Chin and G.M. Grossman, Intellectual Property Rights and North-South Trade, in R. Jones and A. Krueger (eds.), *The Political Economy of International Trade*, Basil Blackwell, Oxford, U.K., 1990, pp. 90–197.

<sup>17</sup> Penrose, *ibid.*, pp. 95–96.

<sup>18</sup> Pugatch, M.P. *The International Political Economy of Intellectual Property Rights*, Cheltenham, UK: Edward Elgar, June 2004, Chapter 3

<sup>19</sup> *Ibid.*

technology transfer and FDI. The former refers mainly to the argument that foreign IP owners, in exchange for obtaining protection in developing countries, are required to make the technology embodied in their products (or processes) available and accessible in these countries.<sup>20</sup> The latter reflects the view that stronger IP protection creates a more secure and attractive environment in which various forms of FDI and technology transfer (mainly via licensing agreements and joint ventures) can take place.<sup>21</sup>

The main difficulty with these two aspects—the direct and indirect effects of IPRs on technology transfer and FDI—is that they are not mutually compatible and may even be contradictory.

On the one hand, when examining the direct effects of IPRs on technology transfer, it is plausible that countries with weak IP capabilities are better off not extending IP protection to foreigners. A notable example is the disclosure of information concerning the particulars of an invention by a foreign IP owner in exchange for obtaining patent protection in a developing country. Here, it makes no sense for that country to grant patent protection to the foreign inventor, as it can behave as a free-rider and obtain the same information from the patent office in the inventor's home country.<sup>22</sup> Empirical evidence suggests that many developing countries, particularly those with reverse-engineering capabilities, are able to copy (or counterfeit) IP-related products without relying on any disclosed data<sup>23</sup>. However, this method has its limitation since when IP-related products cannot be easily copied, it is often due to the fact that information disclosed by patentees is incomplete, in the sense that additional “know-how” is required for the successful exploitation of these products and processes. Here, it is likely that the IP owner will not disclose his know-how without adequate IP protection in the target country.

On the other hand, when examining the dynamic effects of IPRs, it is highly plausible that a stronger IP environment is positively correlated with FDI and technology transfer. Some studies also suggest that a stronger IP commitment would not only make developing countries more attractive to future technological investments but would also enhance their

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<sup>20</sup> For a discussion of this argument, see E.H. Grundman, *The Economic Arguments for Patents and Their Validity for Developing Countries*, *The Indian Economic Journal*, Vol. 19, No. 2, 1970, pp. 193–207; George Sipa-Adjah Yankey, *International Patents and Technology Transfer to Less Developed Countries*, Avebury, Aldershot, U.K., 1987, pp. 15–19; K.E. Maskus and D.E. Konan, *Trade-Related Intellectual Property Rights: Issues and Exploratory Results*, in A.V. Deardorff and R.M. Stern (eds.), *Analytical and Negotiating Issues in the Global Trading System*, The University of Michigan Press, Ann Arbor, 1994, pp. 401–454, particularly at pp. 441–446.

<sup>21</sup> M.R. Sherwood, *Intellectual Property and Economic Development*, Westview Press, San Francisco and Boulder, Colorado, 1990, Chapters 5 and 6; Organization for Economic Co-operation and Development (Oecd), *Economic Arguments for Protecting Intellectual Property Effectively*, OECD, Paris, 1989, p. 11.

<sup>22</sup> Grundman, *supra*, footnote 19, p. 196. Also see A. Subramanian, *TRIPs and the Paradigm of the Gatt: A Tropical Temperate View*, *World Economy*, Vol. 13, No. 4, 1990, pp. 509–521.

<sup>23</sup> R. Evenson, *Intellectual Property Rights, R&D, Inventions, Technology Purchase and Piracy in Economic Development: An International Comparative Study*, in R. Evenson and G. Ranis (eds.), *Science and Technology: Lessons for Development Policy*, Intermediate Technology Publications, London, 1990, pp. 325–356; R.M. Gadbow and T.J. Richards, *Intellectual Property Rights: Global Consensus, Global Conflict*, Westview Press, Boulder, Colorado, 1988, Table 1.2.

ability to climb up the technological ladder and to become more innovative.<sup>24</sup> For example, a recent OECD study (2005) finds that "the empirical analysis presented in this study provides general support for the proposition that the strengthening of IPRs - as measured by the selected indicators - has had a net positive effect on international licensing of technologies between unaffiliated parties during the 1990s."<sup>25</sup> The study also finds that "the growth in international licensing alliances between developed nation licensor firms and developing nation licensee firms also seem to correlate positively with patent reform".

In short, all of the above suggests that a pure economic approach cannot provide a sufficient and satisfactory explanation regarding the creation of IPRs. The structural tensions and contradictions that are built-into the IP system are too overwhelming to be explained by a pure economic language. Accordingly a pure economic approach cannot really explain any specific IP outcomes, such as those of the CIID and pharmaceutical patents phenomena.

## **II. The (international) political economy of IPRs - an Interest-based approach**

Primarily, this paper suggests that the political-economy of IPRs can increase our understanding of the ways in which IPRs are established, managed and exploited at the domestic, regional and international levels.

In particular, this paper advocates the use of a political economy perspective that touches upon interest groups on the hand, and IP systemic outcomes on the other hand (and on all the forces that flow back and forth among them).

A political-economy interest-based approach builds upon theoretical and empirical building blocks identifying a close link between: (1) The conditions of the international economy; (2) Interest group activities (all types of groups), and (3) Economic policy making - at the national, regional and multilateral levels.

According to Krasner, an interest-based political-economy approach has two major lines of inquiry.<sup>26</sup> The first examines the implications of changes in the international economy on political structures and groups, mostly at the domestic level. For example, Frieden and Rogowski, using theories of international trade, adopt this approach when explaining the effects of international economic integration on domestic politics, policies and institutions.<sup>27</sup>

The second line of inquiry, explains how political forces shape foreign economic policy, thereby influencing international systemic outcomes. In this case - a bottom-up approach - causation is reversed and political activities are treated as the explanatory variable. This approach is based on two underlying assumptions: (1) there is a close link between the conditions of the international economy and domestic political activities; (2) national

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<sup>24</sup>. Sherwood, 1990, p. 145.

<sup>25</sup>. Park, W, Lippolds, D. International Licensing and the Strengthening of Intellectual Property Rights in Developing Countries during the 1990s, OECD Economic Studies, Paris, 2005, p. 17

<sup>26</sup>. Krasner, S. 'The Accomplishments of International Political Economy', in: *International Theory Positivism and Beyond*, ed. S. M. Smith K. Booth and M. Zalewski Cambridge: Cambridge University Press, 1996, pp. 120-122

<sup>27</sup>. Frieden A. J., Rogowski, R. 'The Impact of the International Economy on National Policies: An Analytical overview', in: Keohane, R., Milner, H. (eds) *Internationalization and Domestic Politics*, ed. Cambridge University Press, 1996, pp. 25-47

economic policies are subject to different forces and pressures, and that 'knowing who the relevant domestic actors are and what their trade (or other economic) preferences are, is essential for understanding the influence of a sector's policy "structure" on policy outcomes'.<sup>28</sup>

Other studies, focusing primarily on collective action, examined the complex interaction and linkage between interest group activities and policy making at the regional level. For example, Greenwood and Aspinwall found that the most effective European groups come from business sectors with a high degree of concentration, a limited number of members, most of which are multinational companies, and with a clear sectoral definition aimed at limiting the danger of diverging interests.<sup>29</sup>

Coming back to the realm of IPRs, it is suggested that the focus on the process through which IP policy-making is taking place will make the discourse in the field more informed and might even change some of its themes.

The political-economy of IPRs focuses on the linkage between the different interests and goals of specific groups (corporate, NGOs, consumers and even decision-makers and politicians) and IP systemic outcomes.

A political economy approach treats the regulation of IPRs as an ongoing battlefield of interests, such as between those who create knowledge on the one hand and those who consume it on the other. Accordingly, it does not take the international system of IPRs for granted. Rather it explores and unveils the political route by which such a system is constituted and associates its outcome with the particular interests of different groups. By doing so we can increase our understanding of the ways in which IPRs are established, managed and exploited at the international, regional and bilateral levels.

In fact, the author believes that political economy of IPRs is a necessary stage between the economic study of IPRs and the legal interpretation of such rights. In other words, placing IPRs in a political context enables us to understand the process by which economic interests are translated into legal realities.

Nevertheless, we seem to have a problem (methodological and practical) in our current research of the political economy of IP policy-making. That is that the bulk of the research, including that done by this author, tends to focus almost entirely on business interest groups, and on the interests of pro-IP business groups in particular.

On the one hand, many authors acknowledge that powerful business groups, particularly pharmaceutical MNCs, played a crucial role in 'pushing' the issue of IPRs to the international arena.<sup>30</sup> Nogue's, for example, argues that the research-based pharmaceutical industry in the

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<sup>28</sup>. Milner, H. V., Keohane, O. R., ed. *Internationalization and Domestic Politics*, Cambridge University Press, 1996; Milner, H. V. *Resisting Protectionism*, Princeton, New Jersey: Princeton University Press, 1988

<sup>29</sup>. Greenwood and Aspinwall, 1998: 20-22

<sup>30</sup>. Jackson, J. H. *The World Trading System: Law and Policy of International Economic Relations*, 2nd ed. (Cambridge, Massachusetts: MIT Press, 1997; Doane, M. L. "TRIPS and International Intellectual Property Protection in An Age of Advancing Technology" *American University Journal of International*

US, represented by the Pharmaceutical Manufacturers Association (PMA), was the main driving force behind the 1998 intellectual property amendments to Section 301 of the Omnibus Trade and Competitiveness Act.<sup>31</sup> Braithwaite and Drahos argue that the CEO of Pfizer, Mr. Edmund Pratt, was one of the most dominant figures advocating the inclusion of IPRs under the WTO framework (then GATT).<sup>32</sup> According to the authors, the Advisory Committee for Trade Negotiations, (ACTN) which was chaired by Mr. Pratt during the 1980s, was pivotal to the IP-strategy of the US, i.e. linking IPRs to international trade by making them an integral part of the WTO.<sup>33</sup> Braithwaite and Drahos also refer to other key groups, such as the Intellectual Property Committee (IPC) and the Business Software Alliance (BSA), that have considerable influence on US international IP-policy.<sup>34</sup> This author also identified the strong impact of the European research-based pharmaceutical industry on regional and international IP policy- making.<sup>35</sup>

On the other hand, both the above cases of the CIID and WTO deal on patented pharmaceutical drugs cannot be portrayed as a shining success (or as a success at all for that matter) for the pro-IP businesses that were involved in these cases.

As far as contemporary IP issues are concerned, we seem to be engaged in a much more complex and multidimensional policy process. Business interests are still very much involved, and influential! But today, we see a wide range of business groups in the IP playground, including those that are motivated by anti- or weak IP interests such as open source companies and generic pharmaceutical companies. This is not to say that such interests are not legitimate but rather to indicate that even in the business arena, interests concerning the IP field are complex and certainly not one-sided.

We should also bear in mind that anti-IP business interests are as commercial as pro-IP business interests (or in other words, that anti-IP business interests do not equal "altruistic Robin-Hood" like interests).

Other actors are also gaining momentum and importance. Business trade associations are "losing" their lobbying hegemony in the corridors of power. Civil society organisations consumer groups, professional groups and think tanks are now becoming very active in the IP scene (at times even more than trade associations). Their contribution and relative weight to the process of IP policy- making is growing.

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*Law and Policy*, vol.9:2, 1994, pp. 465-497; Nogue's, J. *Patents and Pharmaceutical Drugs - Understanding the Pressures on Developing Countries*, PPR Working Papers, Washington DC: The World Bank, September 1990

<sup>31</sup>. Nogue's, September 1990, pp. 7-8

<sup>32</sup>. Braithwaite and Drahos, *Global Business Regulations*, Cambridge University Press, 2000: Chapter 7, pp. 61-65)

<sup>33</sup>. Ibid.

<sup>34</sup>. Ibid., p. 71

<sup>35</sup>. Pugatch 2004

### III. Brief chronology and overview of the CIID and the WTO deal of patented pharmaceutical drugs

#### CIID

Over the past few years, tons of words have been spilt over the damaging and the beneficial effects of patenting computer and software-based technologies and on its implications for the European software industry. This debate, however, between supporters of *Open Source* and the *Code Nation*, seems to produce more heat than substance.

This is by no means because the arguments and counter-arguments are shallow. On the contrary, it seems that each side has harnessed the entire history of human technological development to support his/her arguments.

The initiative to harmonise the EU's approach to the patentability of computer-implemented inventions, can be dated to 2000, when the European Commission published the results of its first major (commissioned) study - The Economic Impact of Patentability of Computer Programs.<sup>36</sup> In this study the authors found that "the patentability of computer program- related inventions has helped the growth of computer program- related industries in the (United) States in particular the growth of SMEs and independent software developers into sizeable indeed major companies". Their overall conclusion was that "to address the difference between the scope of protection in the U.S. and Europe it would be necessary to either amend the implementing regulations (rules 27 and 29) or to give a broader interpretation to technical contribution. Little did the authors know (or perhaps they did...) that such a colossal war would develop over the meaning, interpretation and manifestation of these two words "technical" and "contribution".

Following a series of consultations (dating back to 1997), the European Commission issued in July 2002 its proposed directive on the patentability of computer implemented inventions – later (notoriously) known as the CIID.<sup>37</sup> In its proposal the Commission stated:" While the statutory provisions setting out the conditions for granting such patents are similar, their application in the case law and the administrative practices of Member States is divergent.... Thus, a computer- implemented invention may be protected in one Member State but not in another one, which has direct and negative effects on the proper functioning of the internal market.. This Directive addresses this situation by harmonising national patent laws with respect to the patentability of computer-implemented inventions and by making the conditions of patentability more transparent."<sup>38</sup>

Between July 2002 and May 2004 a heated debate developed between supporters and critics of the CIID. as the sides competed between themselves and among themselves in providing

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<sup>36</sup>. Robert, H., Holmes, P., Reid, J. *Study Contract ETD/99/B5-3000/E/106: The Economic Impact of Patentability of Computer Programs*, Report to the European Commission on Behalf of the Intellectual Property Institute, London, 19 October 2000, p.5  
[http://europa.eu.int/comm/internal\\_market/en/indprop/comp/study.pdf](http://europa.eu.int/comm/internal_market/en/indprop/comp/study.pdf)

<sup>37</sup>. Ibid., p. 24

<sup>37</sup>. European Commission 2002, OP.CIT.

<sup>38</sup>. Ibid., p. 2

extreme and original doomsday predictions either on the acceptance and/or rejection of the CIID.

On 24 September 2003 the European Parliament adopted at first reading a draft text which was substantially different from the Commission's original proposal.<sup>39</sup> The draft introduced a significant amount of modifications aimed at setting much more restrictive conditions for the grant of a CIID, as well as expanding the exclusions from the CIID. This draft however was rejected by the Council of the European Union.

On 17&18 of May 2004 the Council of the European Union struggled and managed to reach a political agreement on a Common Position on the CIID.<sup>40</sup> The agreement was secured by a qualified majority with the Austrian, Italian and Belgian delegations abstaining and Spain voting against it. The agreed text included some twenty one amendments proposed by the European Parliament at its first reading, concerning mostly the exclusions from the CIID, including the use of patented technology for interoperability and data handling (the European Parliament has suggested a much more permissive approach to the exclusions from the CIID). Nevertheless, at that time, it seemed that the CIID was going to pass.

But even before the CIID was passed to second and third readings havoc broke loose, with some public displays of arm wrestling between the Commission and the European Parliament, the latter proposing in February 2005 to completely restart the CIID process.<sup>41</sup>

By the time the final draft text was brought to the European Parliament (21 June 2005) it has become amazingly difficult to track the original objectives of the CIID from all the proposed modifications.<sup>42</sup>

On July 6 2005 the European Parliament rejected the CIID. Six hundred and forty eight out of 680 MEPs present voted in favour of a multi-party proposal to reject the Commission's draft proposal.

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<sup>39</sup>. European Parliament Legislative Resolution on the Proposal for a Directive of the European Parliament and of the Council on the Patentability of Computer-Implemented Inventions (COM(2002) 92 – C5-0082/2002 – 2002/0047(COD)), 24 September 2003

<sup>40</sup> . *Common Position (EC) No 20/2005 of 7 March 2005 Adopted by the Council, Acting in Accordance with the Procedure Referred to in Article 251 of the Treaty Establishing the European Community, With a View to Adopting a Directive of the European Parliament and of the Council on the Patentability of Computer-Implemented Inventions*, Official Journal of the European Union, 14 June 2005, C144 E/9  
<http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/oj/2005/ce144/ce14420050614en00090015.pdf>

<sup>41</sup> . Charlie McCREEVY European Commissioner for Internal Market and Services Statement to the European Parliament on Computer Implemented Inventions European Parliament Plenary Session Strasbourg, 8 March 2005

<sup>42</sup>. European Parliament, Committee on Legal Affairs. Recommendation on a Second Reading on the Council Common Position for Adopting a Directive of the European Parliament and of the Council on the Patentability of Computer-Implemented Inventions (11979/1/2004 – C6-0058/2005 – 2002/0047(COD)), A6-0207/2005

Amazingly, it seemed that after 5 years of intensive campaigns everyone – including the pro CIID campaigners - was "delighted" by the result of NOT having a CIID (that is everyone other than the Commission):<sup>43</sup>

Philippe de Buck, Secretary General of the European business association UNICE, said: "After a long and difficult debate, the European Parliament took the understandable decision to reject the common position, in order to avoid re-opening an unpredictable discussion on the long-standing basic concepts and definitions of industrial property protection, which would have harmed innovative companies in Europe, small, medium-sized and large."<sup>44</sup>

The Business Software Alliance also argued that it respected the Parliament's decision: "Although we would have welcomed a harmonisation of laws throughout Europe, at least the intellectual property protection that innovators had yesterday will remain the same tomorrow – and that is critical for European competitiveness," BSA Director Francisco Mingorance said: "This is a wise decision that has helped industry to avoid legislation that could have narrowed the scope of patent legislation in Europe."<sup>45</sup>

Jim Murray, Director of BEUC, the European Consumer's Organisation said: "Software is already protected by copyright and should not be protected by patents. We regret that the Parliament did not use its legislative power to ensure this fundamental principle"<sup>46</sup>

The FFII, said: "This is a great victory for those who have campaigned to ensure that European innovation and competitiveness is protected from monopolisation of software functionalities and business methods. It marks the end of an attempt by the European Commission and governmental patent officials to impose detrimental and legally questionable practices of the European Patent Office (EPO) on the member states".<sup>47</sup>

A pareto optimum economic result? Hardly! More like a Machiavellian sense of humour of how to do nothing and still reap all the praises and greetings from one's "subjects".

### **The WTO deal on patented pharmaceutical drugs**<sup>48</sup>

It is interesting to observe how the most politically contested subjects can evaporate overnight, leaving all those affected to pick up the pieces and to try to make sense of what has just happened. The WTO deal on drugs' patents above is such an example.

The inclusion of an agreement on trade-related aspects of intellectual property rights (TRIPs) under the auspices of the World Trade Organization was one of the most innovative and controversial elements of the multilateral trading system. Signed in Marrakesh

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<sup>43</sup>. All quotes are taken from the EurActiv.com website <http://www.euractiv.com/Article?tcaturi=tcm:29-142099-16&type=News>

<sup>44</sup>. Ibid.

<sup>45</sup>. Ibid.

<sup>46</sup>. Ibid.

<sup>47</sup>. Ibid.

<sup>48</sup>. A detailed analysis can be found in Pugatch 2005, OP.CIT

(15 April 1994) as annex 1C to the final act establishing the WTO, the TRIPs agreement represents a significant increase in the global level of intellectual property protection and is considered to be a 'revolution in international intellectual property law'.<sup>49</sup>

The process of implementing the TRIPs agreement by developing countries and least developed countries was not an easy one, particularly in the area of pharmaceutical patents. Much controversy surrounds the linkage between patent rights and medicines. The debate over the extent to which the internationalisation of IPRs affects the ability of poor countries to gain access to affordable medicines has extended beyond the domain of trade policy. This debate has become as emotional as it is rational and encompasses legal and health issues and even questions of business ethics and morality.

Our story begins with Doha Ministerial Declaration on the TRIPs Agreement and Public Health (November 2001)<sup>50</sup>, which was widely perceived as a victory for developing countries and NGOs over the powerful and influential pharmaceutical multinational companies. The headlines were quite melodramatic, for example: 'How activists outmanoeuvred drug makers in WTO deal' (Wall Street Journal Europe, 15 November 2001), and 'Declaration on patent rules cheers developing nations' (Financial Times, 15 November 2001 )

On a more practical and realistic level, the ministerial declaration on the TRIPs agreement and public health has two major elements. The first (paragraphs 1-4) refers to the structural efficacy and the social legitimacy of the agreement. Aside from its diplomatic formulations, which emphasise the importance of public health concerns, the declaration suggests that the TRIPs agreement is flexible enough to accommodate measures aimed at promoting public health and access to medicines. In other words, the declaration re-affirms the legitimacy of the TRIPs agreement, rather than stating that it is irrelevant in times of health crises.

The second part of the declaration (paragraphs 5-7) aimed to provide some operational clarification to the provisions in the TRIPs agreement that relate to pharmaceutical IPRs. Inevitably, these clarifications led to a temporary reduction in the protection of patented medicines. Specifically, paragraph 5(b, c) allows WTO members to use compulsory licenses, without pre-conditions, in times of national emergency (to be determined by each and every member). Other tools are also mentioned but there is no space to elaborate on them in this paper.

**Last but not least, paragraph 6 of the declaration acknowledges that countries with insufficient manufacturing capabilities would not be able to use the tool of compulsory licenses** (that would allow local companies to manufacture original patented drugs). Therefore, it instructed the TRIPs Council to find an expeditious solution to this problem by the end of 2002.

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<sup>49</sup>. Reichman, H. J. "Securing Compliance with the TRIPs Agreement after US v India", *Journal of International Economic Law*, vol.1:4, 1998, pp. 581-601 (the above quote appears in p. 583)

<sup>50</sup>. WTO- Ministerial Conference, Fourth Session. Ministerial Declaration on the TRIPs Agreement and Public Health- Adopted on 14 November 2001, document number: WT/MIN(01)/DEC/2  
TRIPs = Trade Related Aspects of Intellectual Property Rights

Very early in the negotiations it became clear that the proposed solutions to paragraph 6 of the Doha declaration did not focus on humanitarian interests but on commercial ones. Instead of looking for pragmatic solutions for providing cheap medicines to less developed countries, mainly via international alliances and global partnerships, such as the Global Fund to Fight AIDS, Tuberculosis & Malaria, negotiations became a behind-the-scenes battle ground between research-based and generic-based pharmaceutical companies.

The US, returning to its conservative-hawkish IP position, refused to accept any deal that implied a "carte blanche" approach to the use of compulsory license, while developing countries, such as the African Group, advocated the establishment of an IP-free mechanism to paragraph 6.<sup>51</sup> The EU, as always, attempted to juggle with its commitment to the IP interests of pharmaceutical companies and its desire to be perceived as LDC-friendly.<sup>52</sup>

With no apparent consensus at the negotiating table (the deadline for concluding the deal was 31 December 2002), and with the US being blamed for obstructing the deal, the issue of access to medicines has once again caught the attention of both the media and the politicians.

Thus, it became politically necessary to conclude the negotiations on paragraph 6 of the Doha declaration on TRIPs and Public Health in a manner that would be perceived as beneficial to LDCs, but that would nevertheless address the legitimate worries of multinational pharmaceutical companies against commercial abuse. The companies on their part were also keen to conclude the deal before the WTO ministerial meeting in Cancun (September 2003), as they were well aware of the implications of being blamed again of denying medicines to poor populations, should the negotiations end in failure (which, in retrospect, turned out to be a very wise strategy).

And indeed, immediately prior to Cancun (30 August 03), the negotiating parties finally adopted a mechanism for the exportation of generic substitutes of patented drugs to countries that lack domestic manufacturing capabilities<sup>53</sup>. But the saga did not end then, as it took WTO members more than another two years (6 December 2005, slightly ahead of the ministerial meeting in Hong Kong), to embed the paragraph 6 amendments into the TRIPs Agreement.<sup>54</sup>

Politically speaking, the WTO deal on pharmaceutical patents provides a solution to the problem of access to patented medicines in least developed countries. Fifty five politicians, from every country, can also claim success. The deal can be presented and interpreted both as allowing the overriding of patents and the exportation of drugs to less developed countries, hence increasing access to medicines, and as safeguarding the IP interests of

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<sup>51</sup>. WTO Second Communication from the United States, 9 July 2002, document number: IP/C/W/358; Joint Communication from the African Group in the WTO, 24 June 2002, document number: IP/C/W/351

<sup>52</sup>. Communication from the European Communities and their member States, 20 June 2002, document number: IP/C/W/352

<sup>53</sup>. Council for TRIPs, Implementation of Paragraph 6 of the Doha Declaration on the TRIPs Agreement and Public Health (30 August 2003), document number: WT/L540

<sup>54</sup>. WTO-Council for TRIPs, 6 December 2005, OP.CIT

pharmaceutical companies, particularly in the major markets. Research-based pharmaceutical companies can also be pleased. By signing the deal, developing countries and LDCs essentially declare that the TRIPs agreement no longer obstructs efforts to promote public health and access to medicines. In other words, they essentially terminated the damaging public-relations equation according to which pharmaceutical IPRs equal the inability to provide medicines to the poor and weak citizens of developing and least-developed countries. By doing so, the developing countries put the research-based pharmaceutical industry in a much more comfortable negotiating position on pharmaceutical IPRs in the future

But practically speaking, the WTO deal on pharmaceutical patents is of little use (if at all). Although it is not intended to provide a detailed analysis of the agreement on paragraph 6, suffice it to say that the reasons, according to this author's views are twofold. First, the problem of the prices of patented drugs in less developed countries is much less important than other issues related to access to medicines and public health such as: inadequate or non-existent infrastructure for delivery systems and distribution channels, lack of preventative education, insufficient hygiene, pollution and corruption. Secondly, even if the problem of access to medicines was related only to patents, the current deal is extremely difficult to work with. Therefore, the losers, as always, are the poor people in less developed countries, who instead of getting the medicines they need get another really complicated, politically balanced and non-workable deal.

#### **IV. Can we relate the two case studies above? Is there a common political-economy ground? Are there lessons to be learned? Yes, yes and yes**

##### **Relating the case studies above**

As mentioned earlier in this paper, at first glance the two cases above seem to be miles apart and to note a few differences:

The CIID presumably deals with software while the WTO deal on patented medicines deals with health issues

The CIID debate focused on Europe while the latter debate focused on poor populations in least- developed countries and was much more international

The CIID focused in the question of granting patents while the WTO deal on patented medicines focused on the issue of over-riding patents (mostly via compulsory licence)

And the list can go on and on....

But should one stop dealing with the specifics of each case and adopt a more comprehensive view as some striking similarities begin to appear. Five elements are of particular importance:

First - in addition to the fact that both cases were concerned with patent rights, they also ultimately dealt with the questions of ownership, regulation and distribution of KNOWLEDGE-products.

Secondly - in both cases it was clear that the debates were much more than a mere legal disagreement between the interested parties on the interpretation of the law, that could be resolved in the courts. Rather the debates focused on countries' approach towards the process of IP-policy making, and especially on its two major (sometimes conflicting) goals: providing the incentives to create knowledge products in the future and ensuring the use of and wide-spread distribution of knowledge products available at present.

Thirdly - paradoxically, despite the relatively low importance of the two cases in terms of their substance (as argued above this author believes that the outcomes of the two cases are of no significant importance to the current IP practices), the amount of emotional and political heat that these cases have generated is quite staggering.

Fourth – in both cases the debates were framed in terms of benefits and costs to the public (consumer and patients) while the battle was really between commercial interests.

Fifth, in both cases IP owners have lost the battle, but on the long run may be better positioned to "win" the war and vice versa, critics of the IP system may have won these two specific battles, but their ability to secure meaningful results over the long run is questionable. This is explained in the final section.

### **Is there a common political-economy ground?**

Yes there is – an interest-based political economy approach suggests the following:

1. That the cases were really about interests of commercial nature. For of each camp we can track and identify specific key actors with well defined interests (it is possible to enumerate the companies that were for and against the CIID as well as the WTO deal of patented pharmaceuticals but the author chooses not to do so in this paper).
2. That the term interest groups or interested parties can no longer be associated only with IP-based companies that seek to establish a stronger IP environment. Rather, the term interest-groups refers today to both pro- and anti- IP groups, who seek to secure their own interests (commercial and others) in the battle over IPRs.
3. That the rhetoric used by both sides (pro- and anti-` IP groups) is quite similar. It is based on quite a melodramatic language, often with doomsday predictions on "what will happen to the public if their objectives are not secured" as well as encompassing a wide range of moral, economic and legal rationalizations. Interestingly, each camp often associates "devil"-like characters to the other camp (consider itself to be serving the forces of good while the other side serves the forces of evil).
4. That each side is not only engaged in direct lobbying but also in lobbying by proxy, i.e. by mobilizing others to lobby for him. Today the lobbying game is much wider and more complex, including companies, trade associations, NGOs', civil society, think tanks and academics. This is not to say that the lobbying by proxy equals payment for services rendered (though these also exist). Clearly there may be cases in which different parties that

identify with the goals of one actor or another choose to form alliances or coalitions with that actor, either on an ad-hoc basis or on a long-term basis.

5. That in the political battle over the design of IP policies the competing parties try to capture the attention and views of the public and policy makers in order to tilt them to their side. Today, this is done mostly by the different media channels and PR exercises. Often the battles are not only being fought "for the people" but "by the people", i.e. each side tries to show that he IS the public interest. Needless to say 'in most cases the "people" are not fully aware (to put it mildly). of the nuances of the cases that they advocate or criticise.

6. That the huge gap between the substance of the cases that are being fought over, and the amount of heat that they produce may lead to some unpredictable consequences. One of these outcomes is that companies can decide to "abandon" the campaign long before their allies decide (or are persuaded) to do so.

6. That actors driven by commercial interests are going to be involved in the IP game long after other actors (with ideological/academic/or public interests) lose interest or divert their attention to other fields.

### **Are there lessons to be learned from the above cases?**

If we take a pure empiricist approach, then two cases do not provide a large enough sample to validate the assumptions mentioned above. Nevertheless, previous research as well as personal experience allows this author to argue the above claims and to suggest some tentative conclusions (or lessons) concerning the political economy of IP policy-making.

First, intellectual property today is far from being an "objective" technical issue to be discussed and resolved by experts. Like many other commercial aspects in our life, the policy making of IPRs is ultimately a POLITICAL game. And in politics the rules of the game must be learned and played well if one wishes to succeed in securing its goals.

Secondly, an interest-based political economy approach does not make a distinction between the "good guys" and the "bad-guys". Rather according to this approach it is more important to identify the core interests of each side, analyse its objectives, its optimistic scenarios and its pessimistic ones. It is argued that this approach, which is much more realistic and less ideological, can also help us to identify the red lines of each party. These red lines may not always be conflicting, i.e. it is possible that in any given IP debate there are formulas that may be identified as serving the interests of both sides. Thus, a much less passionate approach may sometimes help us to secure practical Pareto results, rather than political agreements with no real substance, such as the ones outlined here.

Thirdly, the experience of the cases above, as well as of the ones preceding it (and probably of those that will follow), suggest that the policy-making of IPRs is a long term process, spreading over years and even a decade. This means that any political campaign aimed at shaping and influencing the policy making of IPRs should be based on long-term planning, with predictable "peaks" and "valleys" along the campaign. Short term "strikes" can be

successful insofar as they are part of long- term strategic planning of the IP lobbying process.

Finally, the political economy of IPRs tells us to look beyond the outcome of a single case or policy. In this respect established commercial players have an advantage over other players as they do take into account and factor in the implications of the outcome of present battles over future campaigns. The research-based pharmaceutical industry handled the campaign of the WTO deal on patented medicines very wisely, understanding that it needs to adopt a damage-containment strategy instead of one aimed at scrapping the deal entirely. In doing so the research-based pharmaceutical industry positioned itself very well to deal with future IP fights. In the CIID case, the pro-IP companies implemented this lesson only partially (some would even disagree with this statement). The reason for that being, among other things, that the pharmaceutical industry is on veteran in the IP battlefields while the pro-IP high-tech companies are relatively newcomers to the game.

Be that as it may, the players that will be the first ones to understand and implement the lessons of the political economy domain of IP policy-making will be able to gain valuable advantages in their future fights. And, these will surely arrive.